

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WYETH, : Civil No. 03-1293 (FSH)
: Plaintiff, :
v. : Defendants. :
TEVA PHARMACEUTICALS, : ORDER ON INFORMAL APPLICATION
USA, INC., ET AL. :
:

This matter having come before the Court by way of letters dated May 31, 2005 and June 1, 2005, regarding the request of the plaintiff to strike the report of Larry Nixon because: (1) it constitutes an affirmative report on issues of validity and claims construction and hence was not timely disclosed; (2) seeks to offer an opinion about inequitable conduct, which is not a part of the case; (3) Mr. Nixon is not qualified to render the expert opinion contained within the report; and (4) Mr. Nixon improperly attempts to discredit the U.S. Patent and Trademark Office (“USPTO”);

and the Court having advised that parties that challenges to Mr. Nixon’s qualifications and the propriety of opinions about the USPTO should be raised as Daubert or in limine applications listed in the proposed joint final pretrial order;

and the Court having been advised that the defendants do not intend to raise issues of invalidity through Mr. Nixon;

and the Court having been advised that the defendants will not seek to offer Mr. Nixon’s opinions about inequitable conduct unless the United States District Judge permits them to amend their Answers to assert a counterclaim based upon inequitable conduct;

and the Court having been advised that Mr. Nixon’s opinions are aimed at responding to the claims construction that Mr. Kilworth has provided on behalf of the plaintiff and that Mr.

Nixon's claim construction opinions "concern issues of claim construction relevant to the infringement analysis" and not invalidity, see Letter of Allyn Lite, dated June 3, 2005, at 2; and as the opinions are being offered in support of the defendants' claims construction for infringement purposes and not invalidity, these opinions appear to be responsive to the plaintiff's experts reports;¹

and for good cause shown

IT IS ON THIS 6th day of June, 2005

ORDERED that applications concerning Mr. Nixon's qualifications and the propriety of rendering opinions about the USPTO shall be preserved as in limine applications and listed in the joint proposed final pretrial order;

IT IS FURTHER ORDERED that challenges to Mr. Nixon's report concerning inequitable conduct are denied at this time given the representation that such opinions will not be offered if the defendants are not permitted to amend their Answers to assert inequitable conduct; and

IT IS FURTHER ORDERED that the request to strike Mr. Nixon's report concerning claims construction offered regarding the infringement analysis is denied.

s/Patty Shwartz
UNITED STATES MAGISTRATE JUDGE

¹Neither party provided the Court with a copy of the written opinions of Messrs. Kilworth or Nixon and hence has relied upon the descriptions provided in the letters.